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# ON THE CONSTITUTIVE FORCE OF REGULATIVE RULES

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## *abstract*

*The paper deals with the problem of delimitation of regulative and constitutive rules. I argue that while regulative rules are and remain a genus of their own, they do have a constitutive import, because they (i) define new forms of behaviour (behaviour compliant with them), (ii) take constituted entities as “input”, (iii) redefine old forms of behaviour as such to which a deontic modality applies and (iv) help to carve out new possibilities of behaviour from a continuum of only potentially distinguishable possibilities.*

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## *keywords*

*Norm, rule, constitutive, regulative, deontics*

In a not yet so remote past, it was an unwritten rule of decorum on Polish public transport means to offer one's seat to an elderly or handicapped person standing in the aisle. Now no longer: you occasionally see whole rows of seats occupied by teenagers or persons in their twenties with sexagenarians or septuagenarians humbly standing in the aisle. Bend over to one of the young sitters and suggest to her the idea of giving up her seat to this lady or that gentleman and you will see eyes resplendent with innocent perplexity and a facial expression, not of a defiant "who are you to tell me that?" or "why should I?" but of sheer wonder at the very idea. Apparently, the idea has never crossed the young person's mind<sup>1</sup>, strikes her as utterly eccentric, and does not exist to her as a human possibility, a *Lebensform*, in the Wittgensteinian<sup>2</sup> nor Thomas-Mannian<sup>3</sup> sense.

But let us begin from the beginning.

Constitutive rules are often defined by oppositions to other kinds of rules. Amongst these oppositions that to "regulative rules" (that is, rules that say that someone must, must not, need not, may or may not, do or abstain from this or that) is probably the best-known. Searle has, in part, defined constitutive rules as in so far distinct from the regulative ones as they, as he put it, do not just regulate but also define new forms of behaviour<sup>4</sup>. On the face of it, the distinction seems clear-cut. (Except that it is not clear whether the distinction be ex- or, much rather, merely intensional<sup>5</sup>.)

Yet, on reflection one easily realises that regulative rules do, them too, define new forms of behaviour—namely, behaviour *compliant with them*. For instance: "Smoking aboard of this aircraft is prohibited": clearly, while not smoking as a form of outer behaviour is just not smoking, whatever its motive, taken jointly with its true motive—if, that is, the desire to comply with the norm in question is its true motive—it is different from, for instance, not smoking for lack of desire to smoke.

1 To be fair to Poland's younger generations, different behaviour is still observable, every now and again.... Yet, it is typically persons over forty who vacate seats for those over sixty or the handicapped.

2 On "form of life" in Wittgenstein and in general (including Thomas Mann and the concept's philological history), see (Conte 1995a, 317f. footnotes 4-6).

3 (Mann 1926).

4 (Searle 1970, 33). Actually, Searle says "create or define", as if this were the same. This sloppiness does not remain without consequences, as I shall show later on.

5 Searle himself suggested (Searle 1970, 186f.) that in a sense even the Decalogue is a set of constitutive rules. I shall return to this issue later.

The Italian philosopher Gaetano Carcaterra has suggested to speak of a “constitutive force” of a norm (rule)<sup>6</sup>, rather than of “constitutive norms” (rules) *per se*. This is close to the idea that all norms partake of constitutivity to a degree. The border-line between the two kinds of norms may then come out blurred, or in any event not so clear-cut. Or maybe it is clear-cut, but only conceptually (intensionally), not extensionally? Or perhaps the matter is even more complex?

This essay is an investigation into this issue.

I presuppose this premise (which I consider incontrovertible): motives (true, as distinct from pretended ones, I stress) of a behaviour are part of the behaviour’s identity, that is, if they change, a different behaviour results. A person abstaining from smoking for a while is not “doing the same thing” whether she acts out of respect for the law<sup>7</sup> (in this case, a norm which prohibits smoking at the person’s spatio-temporal location) or whether she simply has no wish to smoke (e.g. as a habitual non-smoker).

As long as only the outward aspect of the behaviour is considered, both actions (actually, omissions) look identical, but this is an illusion. Depending on what the motives are, the behaviour can take different courses and often does. For example, once the “no smoking!” rule has been abrogated, the temporarily non-smoking habitual smoker may well light a cigarette, while the one who has no desire to smoke will not in the least be affected. Also, one who observes rules out of a desire to observe them may have a further “pharisaic” desire, namely, to be seen as one who observes rules, and consequently his behaviour may be ostentatious or pronouncedly conspicuous, whereas a person who has other motives to behave as the rules say he or she should cannot have a desire like that. This is perhaps not frequent with omissions but think of the dignified immobility of one who refuses to cross a street on red at a crossing where most everybody is crossing the street regardless of the lights. Generally, depending of what our motives are, we shall react differently to new stimuli and modify our behaviour in a different way.

It will, perhaps, be responded that from the point of view of whoever

6 (Carcaterra 1979). On p. 137 he speaks of a “*sostanza costitutiva*” of certain rules in a sense close to “being constitutive purely and simply”.

7 The Kantian “*Achtung fürs Gesetz*”, *Groundwork for the metaphysics of morals*, Akademie-Ausgabe IV, 400. Or out of fear of the punishment; in any case, a behaviour done “in function of” the law (Conte 2000).

lays down regulative rules it makes no difference what motives those who comply with them are guided by. Even if not smoking out of respect for the law is a new form of behaviour, it is, from the point of view of the legislator, equivalent to the old forms, even though not strictly speaking identical with them.

While this is, in a sense, true, it is also true that the legislator is not, and cannot be, quite indifferent to the motives of those whose behaviour she attempts to regulate. If she had been, she would not have cared to lay down any rules, hoping that people will behave the way she wants them to “for whatever motive”. Yet, she knows only too well that this won’t work: among “whatever motives” people happen to have there are, alas, great many which push them to behave in an undesirable way, for instance, to smoke on aeroplanes. The legislator knows this, so she provides a motive to behave the way she wishes, namely, the desire to comply with a rule, and this rule is precisely the regulative rule “Smoking is not permitted aboard of this aircraft”. Saying that the legislator does not aim at provoking a kind of behaviour “out of respect for the law”<sup>8</sup> but a class of behaviours agreeing in the outward aspect only but done for “whatever motives” is nearly as adequate as saying that a buyer does not really will buying the commodity she is buying but only wills “acquiring” it (in “whatever way”)—as if the purchasing act were performed unbeknownst to her and without her consent. It is true that a buyer is interested primarily in the object or service she is buying but it is also true that the immediate object of her willing is the act of purchase, *qua* the preferred way of acquiring the good or service.

Yet still, it is, in a sense, true that the new forms of behaviour that regulative rules give rise to are less interesting to those who draw up and enact these rules than are the new forms of behaviour constitutive rules give rise to in the eyes of their respective legislators. To the former, it is only essential that people behave as the rules say they ought to; they are ultimately interested in the “legality”, to speak with Kant<sup>9</sup>, of behaviour, just like a buyer is ultimately interested in acquiring the object and would welcome being given it for free. To the latter, and also to the “custodians” of constitutive rules (referees, etc.), it is, too, crucial that people should behave in conformity with constitutive rules for the sake of, among other things<sup>10</sup>, such conformity. A person who, due to her mimicking talents, or by sheer

<sup>8</sup> See footnote 2.

<sup>9</sup> *Metaphysics of morals*, Akademie-Ausgabe VI, 219.

<sup>10</sup> Though, in most cases, not exclusively.

coincidence, behaves like everybody else during a religious ceremony or a session of a secret organisation, without knowing the rules, and without the intention to follow them, will not be considered to be “playing the game” and will be treated with distrust<sup>11</sup>.

This is perhaps the most salient respect in which constitutive and regulative rules differ. Nonetheless, because they give rise to a new form of behaviour in the sense here set out, regulative rules can be said to have a *constitutive force*.

However, even if in the final analysis it be conceded that regulative rules do, then too, define new forms of behaviour, it can be objected that these new forms of behaviour are not as radically new as the ones defined by constitutive rules. (Which, too, makes it unlikely, for most classical examples of constitutive rules, that anyone should behave in conformity with them while not knowing them.) How new is not smoking on board of an aeroplane for norm-related reasons? Clearly, it is not radically new: there is (and has been for long) the well-defined (outward) activity of not smoking, there is the deontic modality “you must not”, very well known too, the two combined form a rule, there is the human ability to do something because of a rule (either for the Kantian *Achtung fürs Gesetz*, or for fear of punishment) and that is it, it seems. The new form of behaviour is new in the sense in which a sentence which nobody has cared to formulate is new once it *has been* formulated, but no more: old words, old grammar, new sentence. Perhaps the sentence “the windows were open as the warmth had come”<sup>12</sup> has never before been formed in the English language, yet obviously it is just known words laid out in a known array, thus new in a rather weak sense.

Behaviour conforming to constitutive rules, by contrast, is not just so weakly new. In them, that which the deontic operator (if any) is attached to is not understood apart from the rules. A good example is “castling” in chess. Chess rules forbid castling if the king has already moved. But as distinct from forbidding smoking on board of a plane, the forbidden action

11 This presupposes, obviously, that *somebody* knows the rules. Which is why (as Guglielmo Feis M.A. of Milan University has brought to my awareness) in occasions where empty rituals are practiced and (next to) no-one remembers the underlying rules, there is a general uneasy feeling and an equally general tendency to treat one another with distrust. The Reader may pick his/her favourite example.

12 It is, actually, a translation of a Swedish sentence from a short story by Strindberg: “Fönstren stodo öppna, ty värmen hade kommit” (Strindberg 1913, 23).

is unintelligible (we do not know what it is) unless certain other rules specify its essence, and those rules are, again, constitutive. They *constitute* castling<sup>13</sup>.

It is crucial, here, that the definition of castling is given in the same set of rules as that which contains the prohibition just mentioned. Many regulative rules forbid, command or allow actions which are not immediately understood, but are defined and explained (constituted) somewhere else, *not* within the same body of rules.

For instance, the Ten Commandments would seem to be a classical example of a system of regulative rules. The commandment “Thou shalt not kill”<sup>14</sup> is a clearly regulative rule since it forbids a type of action which we understand immediately, without need for any “constitution”<sup>15</sup>. But the commandment “Thou shalt not commit adultery”<sup>16</sup> is not so immediately understood. What is “adultery” (the root “פָּאָר” (n?p)? Clearly, it is not simply every sexual activity whatever; it is a particularly “constituted” form of sexual activity, it can even be extended to inward activity of the mind<sup>17</sup>. Yet what matters is that it is not defined in the same body of rules, the Decalogue, as distinct from “castling”, which is explained in the same body of rules as that in which it is, in certain circumstances, prohibited, viz. the rules of chess<sup>18</sup>. This sets this commandment apart from typical examples of constitutive rules.

Arguing in this way, however, one runs the risk of making what must seem rather arbitrary decisions. Certainly, the concept of adultery is not explained in the text of the Decalogue itself<sup>19</sup>, but it is explained in the Bible (e.g., in the famous story of king David and Bath-Sheba, Uriah’s wife<sup>20</sup>), of which (both formulations of) the Decalogue are a part. Why consider only

13 It is remarkable that in this sense the syntax of the verb “to constitute” is different from what it is in non-constitutive-rules-related contexts, where it is basically an elaborate or “fancy” variant of “to be”. For instance in “This European project will constitute [sic] a significant breakthrough” ([https://www.zsi.at/attach/PlakatA0\\_neu-1.pdf](https://www.zsi.at/attach/PlakatA0_neu-1.pdf)), where “will constitute a breakthrough” means just “will be a breakthrough”. Constitutive rules, in contrast, that constitute (in the sense relevant here) something-or-other (e.g. castling) are not that thing. (Rules of castling are not castling.) There is an “*obiectum constitutum*” or “*effectum*”, to use a word fittingly invented by Maria-Elisabeth Conte, see (Conte 1995, 282f., footnote 38).

14 The fifth or sixth, depending on which division of the Commandments you employ.

15 Abstraction made from the question whether “to kill” is really the best translation of the Hebrew “חָרַר” (rṣḥ), rather than “to murder” or something else.

16 The sixth or seventh.

17 Mt 5, 28.

18 Art. 3, 8.b.(1).a of the FIDE Laws of Chess, <http://www.fide.com/fide/handbook.html?id=124&view=article>.

19 Ex 20, 1–17, Deut 20, 4–21.

20 2 Sam 11.

a part of a text, rather than the whole, or rather this part than that part? It would be unwise, it seems, to expect that every system of rules should be as compact and surveyable as the rules of chess. But on the other hand it will be awkward to regard the whole of the Bible, and perhaps other Jewish and Christian texts, as one huge formulation of the Decalogue, and after all, some limits must be drawn.... So the Commandments may, with some plausibility, be regarded as a set of regulative rules, even though they presuppose a set of constitutive rules, which are given elsewhere (viz. in the Bible less Ex 20, 1-17 and Deut 20, 4-21).

To give another, perhaps more tractable, example: the German constitution (*Grundgesetz*, Basic Law) assigns various duties and rights to the “German” (*Deutscher*) in a series of what must seem (at least in its first part) undeniably regulative rules. For instance, it assigns to every German the right of freely choosing one’s profession<sup>21</sup>. But who or what is a “German”? There is, certainly, an intuitive concept of a German person, which implies such traits as being of German parents, having lived in Germany since one’s birth, holding German citizenship, speaking German as a mother-language, or a combination of such-like. Yet this intuitive concept is insufficient for the purpose of defining the subject of all the duties and rights laid down in a Constitution; therefore, the German Basic Law defines, in article 116 (1), the concept of a German as: *... a person who possesses German citizenship or who has been admitted to the territory of the German Reich within the boundaries of 31 December 1937 as a refugee or expellee of German ethnic origin or as the spouse or descendant of such person*. Here, it is not possible to say that the regulative rules of which the German constitution in part consists presuppose constitutive rules specified elsewhere.

Thus, it must be said that regulative rules turn out to have, in this case not a constitutive force, but a *constitutive support*, in the sense that they take as “input” entities constituted by constitutive rules on an earlier stage or a deeper-lying level of the same system of rules.

At the latest here, though, the reader might start thinking that I have, from the outset, left out of account an important point, without which all attempt at delimiting regulative and constitutive rules is bound to remain fruitless. This point is the presence (in regulative rules) and the absence

21 Art. 12 (1). Compare the view ascribed to a former prime minister of Italy, Mr. Silvio Berlusconi: “a working class kid should stay working class” (*il figlio dell’operaio deve fare l’operaio*), <http://www.flcgil.it/rassegna-stampa/nazionale/unita-evviva-il-figlio-dell-operaio.flc>.

(in constitutive rules) of deontic operators, such as “may”, “must”, “ought to”, “has the right/duty to”, “is prohibited”, “may”, “may not” and the like. In fact, many prominent constitutive rules do not contain such operators. Also, because of this difference, the way of giving rise to behaviour, whether old or new, would for the two different kinds of rules be quite different. Regulative rules would give rise directly to—causally create—actual behaviour (if anyone cares to observe them), while constitutive rules would only define possibilities. This is because constitutive rules are grammatically descriptive sentences and while they need not describe anything that has actually occurred, they “describe” possible behaviour.

These are well-placed objections. A third one that could be added is that regulative rules with their deontic operators cannot be (easily) squeezed into the Searlean Procrustean bed of the canonical form of all constitutive rules, “X counts as Y in context Z”<sup>22</sup>.

Yet, as research has convincingly shown, it is not true that rules containing deontic operators cannot be constitutive<sup>23</sup>. Amedeo Conte has distinguished a whole class of what he has called “deontic constitutive rules”<sup>24</sup>. The mentioned rule restricting castling to situations in which the king has not yet moved is one of them<sup>25</sup>. Also, all deontic sentences with operators like “may (not)” or “must (not)” can be understood as so-called “spurious deontic sentences”<sup>26</sup>, i. e. descriptive propositions saying that a regulative rule is in vigour; then, regulative rules would be interpretable as constituting certain forms of behaviour *as an object* of duty, or other deontic modality, with respect to which they are not posterior. Searle is right<sup>27</sup> in claiming that (while stealing as such is old,) stealing as something you must not do is (comparatively)<sup>28</sup> new, and is created or defined by “Thou shalt not steal”<sup>29</sup>. I think it is quite common human experience to be amazed on learning that what we thought to be a neutral activity we have innocently indulged in is a bearer (in the given normative context) of a deontic modality; most

22 (Searle 1970, 35).

23 The view that they cannot is sometimes met with in popular discussions, the reason being the presumed Humean gap between “ought” and “is”. This is ironic, since the very distinction between the two kinds of rules was introduced by Searle for the purpose of bridging that gap (Searle 1964).

24 (Conte 1989, 243).

25 (Conte 1989, 244).

26 (Åqvist 2002, 154).

27 See footnote 4.

28 In the perspective of the entire history of humanity the proclamation of the Decalogue is a recent event.

29 The seventh or eighth Commandment.



typically: is prohibited. For instance, this writer was once dumbfounded to find out that taking photographs of consenting adults was prohibited in the main building of the Faculty of Social Sciences of the University of Gdańsk. “Why should anyone issue a prohibition like that?” That is: why has this new form of behaviour: “photographing consenting adults in the said premises as prohibited” come into being? This is yet another way in which regulative rules may be said to have a *constitutive force*.

There seems then to be a perfect analogy between (constitutive) deontic rules governing the constituted entity called “castling”, and (regulative) deontic rules governing the equally constituted entity called “a German” (*Deutscher*), in the rules of chess and the German Constitution, respectively. Why not call them both “constitutive”? Why insist that the various rights and duties of a German are given in rules which, although they have a constitutive support, are themselves regulative?

Because, a reply would go, that kind of deontic modality as that governing castling is essential part of what castling is. If this should seem of little convincing force (as, after all, castling is what it is, i.e. the king and a rook switching fields, all restrictions come afterwards): the chess-bishop’s “duty” to move diagonally, the prohibition of touching the ball with one’s hands in association football (soccer) *are* quite distinctly essential to what the chess-bishop, resp. the game of football, is.

But is the prohibition of adultery not equally essential to a pious Jew or Christian? Is the freedom of choice of profession or occupation not essential to a (Federal Republic’s) German? The correct answer is, I propose, a “yes” when the pious Jew/Christian, or the German are considered *qua* such, and a “no”, when they are considered *qua* human beings. A pious Jew or Christian stops being such while committing adultery, yet obviously does not—human, all too human—stop being a human being. A modern German who believed to be legally bound to choose a profession or occupation and acted upon this belief would not immediately lose his citizenship but would count as seriously out of tune with his status as a German citizen<sup>30</sup>. As a human being such a person, by contrast, would be intact.

Yet analogously, it will be objected, a chess-bishop moved horizontally

30 Candidates to German citizenship are obliged to pass a test of, among other things, their knowledge of the German Basic Law. A person like that would not pass this test (if carried out seriously).

or vertically would stop being a bishop, all the while remaining what it is outside of the chess context, viz. a piece of wood. A human chess-player who moved his bishop in this way would, for this moment, stop being a chess-player, all the while remaining a human being.

There is an important difference, however: The status of a chess-bishop lent to a piece of wood, that of a chess-player or a footballer lent to a human being, is not directly derivative of any essential trait of either. Pieces of wood have no natural propensity or inclination to become counters in a board game, and human beings have no such inclination to sports. There are human beings, to be sure, who do have such an inclination but there also are some who do not, and there is nothing pathological or otherwise abnormal in not liking sports. All (healthy and not handicapped) human beings have, by contrast, a propensity to, and a need of, living in a “polity”, an organised community of other human beings<sup>31</sup>. It is not, of course, essential to human beings as such to be citizens of the Federal Republic of Germany but it is essential to them to have a status (be it that of a citizen or subject, or the like) in a republic, or a kingdom, or a duchy or some other form of a state-like entity. As Kant once noted<sup>32</sup>, even a people of demons would need a state<sup>33</sup>. Similarly for adultery and Jewish/Christian piety: it is not essential (at least from a non-believer’s or agnostic’s perspective) to have that religion or any religion at all, but it is essential to have an ethics (that is, to lead an organised, disciplined life) and again for an ethics it is essential to regulate the matters of sexual life in one way or another. What is condemnable “adultery” from the point of view of one ethical system may be permissible or even highly laudable “polyamory” from another’s, but some “line” on, and some structuring for, sexual love is necessary.

Thus, systems of regulative rules do contain constitutive elements, such as rules pertaining to “a German” or “adultery”, yet they are set apart from systems of “normal” constitutive rules because the constituted elements are articulations of basic traits and needs of human nature<sup>34</sup>. Of course, such articulations contain and cannot help containing, given the limitations of the human mind and will, a large amount of arbitrariness<sup>35</sup>; hence different forms of polity and different ethical systems. Yet they all contrast

31 Aristotle’s “πολιτικὸν ζῷον” (“*politikon zoon*”, “social animal”), *Politics* I, 1253a, and III, 1278b.

32 *Perpetual peace*, Akademie-Ausgabe VIII, 366.

33 As reminds us (Cortina Orts 2003, 16).

34 As set forth by Cotta in his (Cotta 1991). See my (Żelaniec 2011). Or sometimes of non-human nature, such as in the definition of a “built-up area” in the Highway Code.

35 Which is why my position is not simply a variant of *jusnaturalism*.

with systems of constitutive rules (which, in their turn, have regulative elements), because these latter give form to accidental propensities of human beings, and define non-essential (though often interesting and useful) entities<sup>36</sup>.

And finally, there is yet another way in which regulative rules can be weakly constitutive or have a constitutive force. Consider the young sitters on Polish trams and buses. That which more traditionally-minded passengers think is their obligation (viz. vacating their seats for the benefit of the elderly and handicapped) does not exist to them as a possibility to contemplate even though it is conceptually very simple and not at all “constituted”. Yet it is not obvious, in a way in which occupying a free seat during a ride is, it does not suggest itself to your tired body as “the most natural thing to do”—quite on the contrary. It has to be “carved out” from a continuum of most diverse possibilities (to vacate a seat just for a stop, for one minute, for some other time, getting someone else to vacate hers, waiting till the elderly person asks you to be allowed to rest on your seat<sup>37</sup>, making that person to sit on your knees, and so on) none of which is obvious and none of which suggests itself to you on a merely psycho-physiological basis. And exactly that “carving out” (*constituting in a weak sense*) was done by the rule of decorum I mentioned at the beginning of this paper—when it was still in vigour.

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36 This does not apply to the Kelsenian Basic Rule, if it be a constitutive rule, that is. See (Azzoni 1988, 71-78).

37 Which, as Guglielmo Feis M.A. of Milan tells me, is the Italian method, at least amongst the young.

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